BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

This record shows conclusively that no conventional relation of employer and employee existed between petitioner and the engineer of the M. & O., whose sole negligence concededly killed decedent, or between the M. & O. and decedent.

I.

Under these facts may a recovery be had by respondent under the Act? If the answer is negative, then the writ herein sought should issue, because the court below based its opinion upon the ground that "the local law of Illinois made the employees of the M. & O., in law, the employees of defendant in so far as concerns responsibility for the death of Miller" (Opinion, p. 8). In other words, it based its ruling upon an unconventional relation of employer and employee.

(a) To reach an answer to the ultimate question just propounded, we must consider certain subsidiary questions:

(1) The Act does not define "employee," "employer," "employed" or "agent."

(2) Proof of such a relation is a sine qua non to the applicability of the Act. Nothing can be more vital to the existence of a cause of action under the Act. Whether or not a cause of action exists is always a question of substance rather than one of procedure. Consequently, whether or not one is an employee of another is unquestionably to

be determined by substantive rather than procedural law. Therefore, the federal decisions are authoritative.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 S. Ct. 635;
T. & P. R. Co. v. Rigsby, 241 U. S. 33, 41, 60 L. ed. 874, 878;
Central Vermont R. Co. v. White, 238 U. S. 507, 511, 512, 59 L. ed. 1433, 1436, 1437;
Southern R. Co. v. Gray, 241 U. S. 333, 338, 339, 60 L. ed. 1030, 1034;
New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 371, 62 L. ed. 1167, 1171.

(3) Because this question must be determined by substantive rather than procedural law, and because Congress has exclusively occupied the field of liability as between employer and employee under the record facts here, all state law, both statutory and judicial, has been superseded on questions of substance. Therefore, whether the relation of employer and employee existed between petitioner and the M. & O. engineer, respectively, must depend wholly upon federal decisions.

See authorities last above cited.

(4) This Court holds that "employee" and "employed" are used in the Act in their ordinary sense and to designate the conventional relation of employee and employer, and that absent this conventional relation between the employer-defendant and the injured employee, respectively, no recovery may be had under the Act.

Robinson v. B. & O. R. Co., 237 U. S. 84, 59 L. ed. 849;
C. & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. 379;
Hull v. Philadelphia & Reading R. Co., 252 U. S. 475, 64 L. ed. 670.

(b) North Carolina R. Co. v. Zachary, 232 U. S. 248, 254, 58 L. ed. 591, 595, apparently is in conflict with the three decisions last above cited, as well as with many other decisions of this Court, which hold that by passing the Act Congress has exclusively occupied the field of liability of an employer for injuries to or the death of an employee under circumstances which make the Act applicable, with the result that all state law, statutory and judicial, has been superseded on questions of substance.

See authorities under I (a) (2), supra.

(c) There are three possible theories which destroy the decisive effect of the Zachary case: (1) It is wrong, (2) it has been overruled by later decisions of this Court, and (3) it is distinguishable from the case at bar.

(1) Is the Zachary case wrong? This Court stated and followed the local rule of North Carolina, viz., that a lessor railroad company is liable for the acts of its lessee, because the latter is the former's "substitute or agent" in the performance "of the public duties assumed by the lessor under its charter."

Is the local law applicable? The answer is unquestionably negative, because obviously whether or not the employer-employee relation exists is a basic question, and, therefore, one of substance rather than procedure. This Court so says.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, 34 S. Ct. 635;
Central of Vermont R. Co. v. White, 238 U. S. 507, 511, 512, 59 L. ed. 1433, 1436, 1437.

(2) Because both of these decisions are subsequent to the Zachary opinion, and because they both interpret the Act and reach conclusions contrary to that reached in the

Zachary opinion, they by very strong implication overrule the Zachary Case.

(3) Moreover, the North Carolina Railroad Company did not operate any part of its railroad, but confined its activities "to receiving annual rents and distributing them among its stockholders" (232 U. S., l. c. 257, 58 L. ed., l. c. 595). That is not at all the condition here, as petitioner is very actively engaged in exercising its franchise rights and fulfilling its franchise obligations, in exactly the manner required by its franchise and ordered by this Court.

See authorities under II (b), post.

II.

But even though it should be assumed that because the Act does not define the terms here involved, determination of their meanings is a matter of procedure, that because the case was tried in a state court the terms must be defined by the state law; and that under the state rule any railroad which permits another railroad to use its tracks becomes liable for the acts of the user railroad, on the theory that the latter is the agent of the former, how stands the case?

(a) The lessor-lessee rule is based upon the theory that no railroad company may escape its franchise obligations to operate a railroad by voluntarily permitting another to operate it. Some of the courts say this makes the user line the agent of the lessor line, because the former is performing a duty cast by law upon the latter.

East Line R. Co. v. Culbertson (Tex. Sup.), 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 897;
Williard v. Spartanburg U. & C. R. Co., 124 F. 796, 800 et seq.;
Hukill v. Maysville & B. S. R. Co., 72 F. 745;
Hulen v. Wheelock (Mo. Sup.), 300 S. W. 479, 485.

(b) But the rule cannot be applicable to petitioner, because it is based upon the premise that it is the franchise duty of the chartered railroad itself to operate its line of railroad and not to operate it through another railroad company. That is not this case. Petitioner is operating its properties, but it is a union station and terminal company whose charter purpose is to furnish to line-haul railroads a unified terminal system consisting of a union depot and tracks and facilities "to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads" * * * (Petitioner's Charter, R. 31). It could not fulfill its franchise obligations without providing these connections and without making them available to all of the line-haul railroads. Thus, in permitting the M. & O. train to pass over its track on the occasion in question, it was strictly fulfilling its corporate obligations. It was not conducting its corporate business through a substitute or agent, but was itself conducting its own business strictly in accordance with its franchise duties. Consequently, as the reason for the application of the lessor-lessee rule does not exist in this case, the rule is inapplicable.

Georgia Railroad & Banking Co. v. Friddell, 79 Ga. 489, 7 S. E. 214, 11 Am. St. Rep. 447.

(c) But even if we should further assume that the lessor-lessee principle is not taken out of this case by either the provisions of the act or by reason of the fact that petitioner is strictly fulfilling its franchise duties and as a consequence the reason for the application of the rule is not present in this case, nevertheless, the lessor-lessee rule is not applicable to petitioner for the reason that it rests upon the assumption that the law creates the relation of principal and agent between lessor and lessee, respectively; whereas the relationship between petitioner and the M. & O. and all of the other user lines, is the exact opposite. This Court

holds that petitioner is, and in order to avoid prosecution as an unlawful monopoly must continue to be, the impartial agent of each line of railroad which uses petitioner's facilities. Therefore, while the using lines would be liable for the acts of petitioner on the ground that petitioner is the agent of each of them, petitioner, as such agent, could not be liable for the acts of its principals. In other words, petitioner cannot be liable under the respondeat superior doctrine for the acts of the using lines, because it is not the superior and the using line is.

U. S. v. T. R. R. A., 224 U. S. 383, 56 L. ed. 810;
U. S. v. T. R. R. A., 236 U. S. 194, 59 L. ed. 535;
State ex inf. v. T. R. R. A., 182 Mo. 284, 296 et seq.

(d) Under these decisions petitioner has no choice as to who shall use its terminal facilities. It must by decree of this Court permit any line haul railroad which chooses so to do to use its facilities on exactly the same terms as does every other line-haul railroad. Its permission to use, therefore, is involuntary rather than voluntary, and, consequently, it is without the lessor-lessee rule of liability.

Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275.

III.

The court below applied the res ipsa loquitur doctrine on the theories that "the local law of Illinois made the employees of the M. & O., in law, the employees of defendant, in so far as concerns responsibility for the death of Miller, and also in view of the fact that dispatch office employees of defendant controlled the movement of both trains" (Opinion, page 8).

We have disposed, supra, of the first theory relied upon by the court below for the application of that doctrine.

It is conceded petitioner had no physical control over the M. & O. train. The cardinal principle of res ipsa loquitur is exclusive physical control by defendant of the instrumentality which produced the injury.

Scott v. Louden Dock Co., 3 Hurl. & Co. 596 (Ex. 1865);
45 C. J., Sec. 768, p. 1193;
38 Am. Jur., Sec. 300, pp. 996, 997;
Wigmore on Evidence (3rd Ed.), Vol. 9, Sec. 2509, p. 380 et seq.;
San Juan Light & T. Co. v. Requena, 224 U. S. 89, 56 L. ed. 680, 684;
Louisville & Nashville R. Co. v. Chatters, 279 U. S. 320, 73 L. ed. 711, 719.

This disposes of the second reason given by the court below.

ARGUMENT.

The Act provides that "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * or in case of the death of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier * * *."

To recover plaintiff must prove:

(1) Defendant was a common carrier;

(2) Employment of plaintiff (or his intestate in case of death) by defendant;

(3) Injury to plaintiff (or death of plaintiff's intestate);

(4) Caused in whole or in part by defendant's

(a) officers,
(b) agents, or
(c) employes.

Are these requirements met?

(1) Defendant (petitioner) was and is a common carrier.

(2) Decedent was employed by defendant.

(3) Respondent's intestate was killed.

(4) But his death was not caused in whole or in part by any of defendant's (a) officers, (b) agents, or (c) employees, but solely by the negligence of the M. & O. engineer, unless the fact that the M. & O. train was moving over petitioner's track is sufficient to make the M. & O. engineer petitioner's "agent" or "employee." Obviously he could under no theory have been an officer of petitioner.

Manifestly any relation of principal and agent or employer and employee created by the lessor-lessee rule is unconventional. It is a relation in law, but not in fact. Webster's Dictionary defines "conventional" to be:

> "Formed by agreement or compact; stipulated; contractual; opposed in law to legal and judicial."

As the M. & O. engineer did not become petitioner's employee "by agreement or compact," stipulation or contract, he undoubtedly was not petitioner's employee in the conventional sense. Because "conventional" means in fact as distinguished from in law—"opposed to legal and judicial"—a conventional agent or employee is one in fact rather than one in law.

I.

Thus we reach the ultimate question for determination: Can there be a recovery under the Act in the conceded absence of the conventional relation of employee and employer between the injured person (or in this case respondent's decedent) and the one whose sole negligence caused the injury? If the answer to this question must be in the negative, the judgment of the court below cannot stand. It answered it in the affirmative, saying:

> "The local law of Illinois made the employees of the M. & O. in law the employees of defendant in so far as concerns responsibility for the death of Miller" (Opinion, p. 8).

In other words, the court below based its judgment on an unconventional (legal and judicial) relation of employer and employee instead of upon the conventional (in fact, or "opposed to legal and judicial") relation of employer and employee.

(a) To answer this principal question it will be necessary to consider several subsidiary questions: (1) Are

"employee," "employer," "employed" and "agent" defined in the Act? (2) Is the question whether or not the relation of employer and employee (used hereafter to mean principal and agent as well) one of substance or of procedure? (3) If it is one of substance, is it to be answered by reference to federal decisions or (as this case was tried in a state court) by state decisions? (4) If it must be answered by the federal decisions, has this Court passed on it?

(1) The Act does not define "employee," "employer," "employed" or "agent." Therefore, we must determine elsewhere the meanings of these terms. To what source shall we go for that purpose?

(2) and (3) Proof of the relation of employer and employee is absolutely essential to the maintenance of an action under the Act. Obviously, therefore, proof of the existence of the relation is very much more substantial than upon whom rests the burden of proving contributory negligence or freedom from it. Yet this Court has said that who must carry that burden is a question of substance rather than of procedure, and that therefore the determination of the question must be had under the federal decisions rather than under those of the state in which the cause is tried. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 512, 59 L. Ed. 1433, 1436, 1437.

(4) This Court has held directly that "Congress used the words 'employee' and 'employed' in the Act in their natural sense, and intended to describe the conventional relation of 'employer' and 'employee.'" As the word "agent" is used in the same section of the statute, in the same sentence, and is separated from the word "employee" only by the word "or," it is inevitable that Congress used it also in its "natural sense and intended to describe the conventional relation of" principal and agent.

In Robinson v. B. & O. R. Co., 237 U. S. 84, 59 L. ed. 849, plaintiff, a Pullman porter, was injured while moving over defendant's line of railroad. In his contract of employment with his employer, The Pullman Company, Robinson released all railroads over whose lines he might travel in the scope of his employment "from all claims for liability of any nature or character whatsoever on account of any personal injury or death."

Section 5 of the Act provides that "any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void."

Necessarily if plaintiff was an employee of defendant, the release of railroads provision of his employment contract with The Pullman Company was void by reason of the provisions of the above section of the Act. As this Court said:

> "The inquiry rather is whether plaintiff comes within the statutory description; that is, whether, upon the facts disclosed, it can be said that within the sense of the act the plaintiff was an employee of the railroad company * * * We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of 'employer' and 'employee.' "

In the later case of Chicago & Alton R. Co. v. Wagner, 239 U. S. 452, 456, 60 L. ed. 379, 381, Wagner, a conductor of C. B. & Q. R. Co., in charge of one of his employer's trains moving over defendant's tracks in the City of Chicago, under an arrangement between the two railroad companies, was injured by a semaphore post allegedly too close to the track.

"Wagner was a member of the relief department of the Burlington Company, to which the employees of that com-

pany made monthly contributions, and (that) in his agreement with that company it was provided that his acceptance 'of benefits for injury' should operate 'as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury.' The Alton Company was not thus associated with the Burlington Company, and the release by its terms did not run to it. But it was insisted that the Burlington Company was a joint tort-feasor with the Alton Company, and hence that release to the former would operate to discharge the latter."

Section 5 of the Act permits a railroad company to set off against any judgment rendered against it under the Act whatever "sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

The Alton Company took the position that because Wagner had accepted benefits from the Burlington, such acceptance released the Alton Company because it was a joint tort-feasor with the Burlington Company. Wagner met this contention by saying that his agreement of release was void under section 5 of the Act.

If the opinion of the court below in the case at bar is correct in applying the Illinois law to the case at bar, necessarily the Act would have been applicable to Wagner's case, which arose and was tried in Illinois. In the case at bar decedent was employed by petitioner and recovered on the negligence of the M. & O., whereas Wagner was employed by Burlington and recovered on the negligence of Alton. Thus the employee-employer relationship and the identity of the tort-feasor was exactly analogous in each case. The only difference is that in the case at bar respondent sued petitioner (the Burlington in

the Wagner case), whereas in the Wagner case he sued Alton (the M. & O. in the case at bar). In each case but one of the essential requisites of applicability of the Act was present: In the Wagner case the negligence of defendant, and in the case at bar the employee-employer status between decedent and petitioner. In each case one of the primary requisites was absent: In the Wagner case the employee-employer relationship between Wagner and Alton, and in this case the negligence of defendant. The existence of the relationship is just as necessary (but no more so) as negligence, and vice versa.

The common-law lessor-lessee rule of liability of Illinois was just as applicable (but no more so) to the Wagner case as to the case at bar. In other words, if the Illinois common-law rule that a railroad which permits another railroad to use its tracks is liable for the user's acts (the rule applied by the court below in the case at bar) is applicable to the case at bar, it was equally applicable (but no more so) to the Wagner case. Under that rule as applied by the court below in the case at bar Wagner could have bottomed his action upon the Act as the court below holds that recovery may be had under the Act upon a showing of negligence by one other than the employer, and by whom decedent was not employed in the conventional sense. Implicit in this holding and the reasons assigned for it is the conception that the lessor-lessee rule of Illinois makes the employees of both the lessor and the lessee employees of the lessor for the purposes of the Act. Therefore, under the ruling of the court below, Wagner could have sued Alton as one of its employees, and could have bottomed his action upon the act.

But this Court said in the Wagner case:

> "The action was not brought under that act. There were allegations in the original declaration to the effect that Wagner, at the time of the injury, was en-

gaged in interstate commerce as an employee of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the federal statute; and this indeed was manifest, as the Burlington company was not a party to the action, and the Alton company was not the plaintiff's employer. Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 91, 59 L. ed. 849, 851, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1. It was tried as a common-law action on the case."

In Hull v. Philadelphia & Reading R. Co., 252 U. S. 475, 64 L. ed. 670, the decedent was in the employ of Western Maryland R. Co. His administratrix sued the defendant over whose lines decedent was passing on a Western Maryland train when he was killed by one of defendant's locomotives.

There was a contract between the two railroad companies providing in detail for the operation of trains of each company over the lines of the other. As in the Wagner case, supra, plaintiff sued the lessor line, whose negligence caused her decedent's death; but unlike the Wagner case, she brought her action under the Act upon the following theories: (1) A general servant in the employ of one becomes the servant of another when at the decisive time he is doing the work of the other; (2) because it is the nondelegable duty of a railroad company to operate its railroad, and if it permits another to perform that duty that other becomes the former's servant.

These two theories when combined make what we term for brevity the lessor-lessee theory, viz., that a lessor railroad company (licensor, permittor, contractor, etc.) is liable for the acts of the lessee railroad company (licensee, permittee or contractee, etc.).

Thus it is seen that in the Hull case there was directly involved the lessor-lessee liability rule upon which the court below determined this case.

Nevertheless this Court said (252 U. S., l. c. 479, 480, 64 L. ed., l. c. 673):

"We hardly need repeat the statement made in Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 94, 59 L. ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress used the words 'employee' and 'employed' in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recited, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See Standard Oil Co. v. Anderson, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252.

"North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914 C, 159, is cited, but is not in point, since in that case the relation of the parties was controlled by a dominant rule of local law, to which the agreement here operative has no analogy."

(b) North Carolina R. Co. v. Zachary, 232 U. S. 248, 254, 58 L. Ed. 591, 595, is in apparent conflict with the Robinson, Wagner and Hull cases, as well as with the cases cited heretofore in the summary of argument I (a) (2), which declare that by passing the Act Congress exclusively occupied the field of liability between employer and employee under circumstances which make the Act applicable, thereby superseding all state law, statutory and judicial, on questions of substance.

The record in the Zachary case discloses that the North Carolina Railroad Company had leased all of its facilities to the Southern Railway Company, performed none of its franchise duties, and confined its corporate activities "to receiving annual rents and distributing them among its stockholders."

Zachary, an employee of Southern Railway Company, sued the North Carolina Railroad Company under the act, based his cause of action upon the negligence of his own employer, but brought his action against his employer's lessor.

This Court stated that, because the local law of North Carolina made the defendant in the Zachary case liable for the acts of its lessee, Zachary might maintain an action under the act.

(c) There are three possible theories which destroy the Zachary case as an authority on this question.

(1) This Court decided it on the lessor-lessee rule locally followed in the State of North Carolina, which made the lessee's employees, in law, the lessor's employees. As we have demonstrated, supra, I (2), (3), the question whether the employer-employee relation exists within the meaning of the act is indubitably one of substance, and is, therefore, to be decided, not by the local law of any state, but by the federal law. Because this was not done by this Court in the Zachary case, this Court's decision is wrong and should be specifically overruled.

(2) It has been impliedly overruled by the Robinson, Wagner and Hull cases heretofore discussed.

(3) Moreover, the North Carolina Railroad Company made no pretense of operating its railroad properties as it had been chartered to do, but entered into a contract with Southern Railway Company whereby it leased to that company all of its property, performed none of its charter duties or obligations, and confined its activities "to receiving annual rents and distributing them among its stockholders." This is in direct contrast to the condition here. Petitioner is a union depot and terminal company, chartered for the very purpose of permitting line-haul railroads to use its facilities to the fullest extent. The more other lines use its facilities the better it is fulfilling its charter duties, the better service it is rendering to the public and the line-haul railroads. Instead of avoiding any of its charter obligations and duties, it is strictly and to the letter fulfilling them. Moreover, it is compelled to do this by order of this Court, as will be more fully developed, post, II (b).

II.

Even though we should assume that because the Act does not define the terms here involved, the interpretation of them is a question of procedural law; that because this case was originally tried in a state court, the terms must be defined by the state law; and that under the state rule the lessor-lessee rule makes the M. & O. engineer, in law, the servant of petitioner, is that rule applicable under the circumstances shown in this record?

(a) The lessor-lessee rule is based upon the theory that no railroad company may escape its franchise obligations to operate a railroad by voluntarily permitting another railroad company to operate it. Where the rule is recognized at all, it is said that the lessee line becomes the agent

or servant of the lessor line because it is performing the duties cast by law upon the lessor or owner of the railroad. In other words, the charter is a contract between the state and the railroad company whereby the state agrees to permit the railroad compay to organize and operate a railroad, and the latter agrees so to do. Thereby the railroad company becomes obligated to operate a railroad for the benefit of the public. Consequently it is held by some courts that if the chartered railroad company leases all of its properties to another railroad company, and the latter operates the railroad, the owner railroad is meeting its obligations to the public only by and through the acts of the operating company which thereby becomes the agent of the owner compay, and the latter is therefore responsible for the acts of the operating company.

(b) But this rule cannot be applied to petitioner because it is based upon the premise that it is the franchise duty of the chartered line to itself operate its line of railroad; that it has voluntarily failed to do so, and is permitting another railroad company to do so for and in its behalf. That is not at all the case here.

Petitioner was chartered to do exactly what it is doing, and it is fulfilling to the letter its franchise obligations and duties.

The Union Depot Company, organized in 1874, was created for the purpose of constructing and maintaining a union station for receiving and discharging passengers, and was authorized to lay the necessary tracks to make such depot or station accessible. It was further authorized "to make such arrangements with railroad, tunnel, bridge, or other companies, as may be necessary to connect other tracks with their own," and to make proper and reasonable charges for the use of its depot and appliances (R. 29).

The Terminal Railroad of St. Louis was organized in 1880. One of its charter purposes was to construct, main-

tain and operate tracks from the tracks and termini of Union Railway and Transit Company of St. Louis, the Union Depot Company of St. Louis, the Tunnel Railroad of St. Louis, and other railroads specifically mentioned, and from the tracks and termini "of any other railroad entering or to enter said City of St. Louis, and the places to which said road is to be constructed, maintained, and operated, are the yards, depots, and side tracks, now existing, or to be provided, in said City of St. Louis, and such connections with other railroads already constructed, or to be constructed, as may be found necessary or convenient, and such factories or other establishments, as may need such connections, the general object and purpose being, to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter the same, and all individuals and companies doing business with said railroads" (R. 30, 31).

In 1889, by proper agreement, Union Railway and Transit Company of St. Louis and Terminal Railroad of St. Louis were consolidated under the name of "Terminal Railroad Association of St. Louis" (R. 31, 32, 33).

The Union Railway and Transit Company of St. Louis was a corporation which owned certain tracks and facilities necessary to co-ordinate and unify the terminal facilities. Subsequent to the consolidation of that company and Terminal Railroad of St. Louis, whereby Terminal Railroad Association of St. Louis came into existence, the latter took over Union Depot Company completely, both its franchise and its property.

Exactly in point on principle is the case of Georgia Railroad & Banking Company v. Friddell, 79 Ga. 489, 11 Am. St. Rep. 447, 7 S. E. 214, which was an action wherein respondent Friddell, who was in the employ of appellant, was injured by the train of another railroad using appel-

lant's tracks. In denying the applicability of the lessor-lessee principle, the Supreme Court of Georgia said:

> "We think it makes no difference whether there was a contract or not (between the two companies for the use of the track). If each of these companies had the charter right to come to the City of Atlanta, as each of them had, they could use a common track at a terminal point belonging to them jointly, or tracks in common, belonging to them severally; and in the use of either, each company would be upon its own franchise. It would not be exercising the franchise of the other company. That is the distinction. Hence, the verdict in this case was wrong. There could be much said in favor of several companies having the same privilege, which we think they have, to use the same track in common in a city; and we know nothing that would subject one company to (liability to) its employees (however, the passenger's rule of liability would be different) for the negligence of employees of another company. The risk of service covers this, and an employee is not without redress. He cannot sue his own master, but he can sue the other company—the one whose employees were at fault, and recover against it. So we rule and set out in the head-notes, and rest the case upon what we think is the fair principle applicable to the facts. Where numerous railways connect in the same City, the City is a common station for all; and interchange in the use of tracks is a needful practice for the accommodation of traffic. It promotes the common interest of the companies, and the interest of the public, and employees who are unwilling to expose themselves to the risks of so reasonable a method of business are not abreast with the exigencies of railway service."

In United States v. Terminal Railroad Association of St. Louis, 224 U. S. 383, 56 L. Ed. 810, 816, this Court recognized the difference between petitioner and the ordinary line haul railroad company. It there said:

"We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce."

(c) There is a further reason why the lessor-lessee rule cannot be applied to petitioner. It rests upon the legal fiction that the relation of principal and agent exists, respectively, between the lessor and the lessee lines, whereby the former becomes liable for the acts of the latter under respondeat superior. Unless that situation exists between petitioner and the M. & O., inevitably the rule cannot apply in this case.

This Court has settled the matter for all time by holding that whereas the relation of principal and agent did exist between the M. & O. and petitioner, the latter was the agent of the former, rather than the principal of the latter. United States v. Terminal Railroad Association, 224 U. S. 383, 56 L. Ed. 810.

The United States prosecuted petitioner as an unlawful combination in restraint of trade and sought its dissolution. This Court refused to dissolve petitioner, but compelled it to act as the impartial agent "of every line which is under compulsion to use its instrumentalities." In the course of its opinion this Court said (56 L. Ed., l. c. 819):

"Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out

> of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage."

In the later appeal of the case, 236 U. S. 194, 59 L. ed. 535, the Court found that appellant had complied with the requirements laid down in the previous opinion, by becoming the impartial agent of each line-haul railroad using appellant's facilities.

Thus, it is seen that this Court ordered and directed that petitioner, as a condition to its continued operation, should become "the impartial agent of every line which is under compulsion to use its instrumentalities." In the second opinion mentioned it was found that petitioner had complied with that requirement. Therefore, petitioner is now, and was at the time of decedent's death, the agent of the M. & O., but not its principal. Obviously, in its relation to the M. & O., it could not be both principal and agent at the same time, nor could the M. & O., in its relation to petitioner, be both principal and agent at the same time. Petitioner, by these decrees of this Court, became and was on the day of decedent's injury and death the agent of the M. & O. If it was the agent, then it was not the principal, and is not liable for the acts of the M. & O. upon the theory that the M. & O. was petitioner's agent. But to make petitioner liable for the acts of the M. & O., it must have been the principal of the M. & O. at the time the decedent was killed. It was not and could not have been such principal, in view of the decisions of this Court, which compelled exactly the converse relation. Obviously, therefore, the lessor-lessee theory is not applicable here

because that is made to depend upon the relationship of principal and agent, the lessor being the principal and the lessee the agent, whereas the status here shown is the exact reverse. The agent never can become liable for the acts of his principal. Therefore, where, as here, the negligence is shown to be that of the principal rather than that of the agent, the latter cannot be liable for the former's negligent acts.

(d) But there is another reason why this lessor-lessee rule cannot apply to petitioner, viz., it is based upon the voluntary failure of the lessor to fulfill its charter obligations. Petitioner has not only not voluntarily failed or refused to perform its franchise duties, but even if it so desired it could not do so and keep its corporate charter.

Under the decisions of this Court, heretofore mentioned, it must permit all line-haul railroads which so desire to use its tracks and other facilities upon exactly the same basis. Unless it does this, it must cease to operate, because it and its associated companies become an illegal combination in restraint of interstate commerce. Thus it is under compulsion to do exactly what would inevitably make it liable for all of the acts of all of the line-haul railroads who use its tracks if the lessor-lessee principle is applicable. That principle cannot be effective except upon the voluntary act of a corporation which seeks to evade its franchise responsibilities. Appellant has no choice in the matter but must grant to every line-haul railroad which seeks it, permission to use its facilities; not for the purpose of evading its franchise obligations, but of fulfilling them.

Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275, was a case in which plaintiff's decedent was an employee of defendant, and was struck and killed by a locomotive owned and being operated over defendant's tracks by Southern Railway Company under an operating agreement between the two companies and other companies using defendant's facilities.

Two Acts of Congress approved February 12, 1901, and February 28, 1903, provided that any railroad now or hereafter lawfully existing and authorized to extend a line of railroad into the District of Columbia, or having secured the right to operate over the lines of any other railroad, to a point of connection with the tracks of said defendant Terminal Company, shall have the right to joint use of said station and terminals upon the payment of a reasonable compensation for their use, and upon other considerations mentioned in said acts.

In denying a recovery the Court said:

> "It is apparent from these acts that Congress contemplated and provided for the construction of a general Union Station for all railroads passing through the District of Columbia. The railroad tracks belonging to the defendant and the Baltimore & Ohio Railroad Company were required to be used by the Southern Railway Company and any other railroads hereafter entering the District of Columbia. This provision was not optional, and in case of a failure to agree, a tribunal was provided for determination of the amount of compensation. It is true that the contracts made under these statutes required the using companies to obey the rules and regulations of the defendant. Some general rules and regulations had to be observed in the conduct of the trains to prevent confusion and accident, and this was contemplated by Congress, which authorized the contracts. It is clear then that the plaintiff's intestate was an employee of the defendant; that he was killed upon defendant's tracks by an engine operated by the Southern Railway Company in accordance with the provision of the Act of Congress and of the contract aforesaid. The negligence was the negligence of the Southern Railway Company, and not of the defendant, and the Court was right in refusing to enter a judgment for the plaintiff on the verdict.
>
> "The judgment is affirmed."

This Smith case is a direct authority sustaining our position on this question. The only difference between that case and this case is that in the former the compulsive instrumentality was Congress, whereas in this case it is this Court. It is impossible to see why the principle should not apply to the Smith case and should apply to the case at bar. The mere fact that in the one instance the compulsion originated in the United States Congress and in the other in this Court, cannot affect the principle involved. In each instance the terminal company had no choice but had to comply with the demand of a superior authority. Moreover, the reasoning of the Smith case is sound and should be followed for the reasons heretofore set out.

III.

As heretofore stated, this case was submitted to the jury upon the res ipsa loquitur principle. Unless the lessor-lessee rule applies, that was error, because the engineer of the M. & O. was in the exclusive physical control of his train, and had ample opportunity to stop it before killing decedent. It is quite true that he was moving over petitioner's track under the orders of the latter's dispatching employee. But any negligence on their part (and there was none) could not have been the proximate cause of Miller's death, because the engineer had more than ample time and space within which to stop before he struck petitioner's train.

For these reasons the writ here sought should issue.

Respectfully submitted,

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